In The

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1742

THE STATE TAX COMMISSION, THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

*Petitioner,*

*against*

HOLLY S. CLARENDON TRUST,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The New York State Tax Commission prays that a writ of certiorari be issued to review the order of the Court of Appeals of the State of New York entered in this case on February 22, 1977, insofar as the same affirmed the judgment of the New York Supreme Court, entered March 3, 1976 granting relief to the named petitioner (respondent Holley S. Clarendon Trust).

### Opinions Below

1. The opinion of the New York State Supreme Court, Special Term, Monroe County, dated February 28, 1976 is set forth as Appendix A. It is not reported.

2. The memorandum of affirmance of the New York State Court of Appeals was handed down on February 22, 1978 and is set forth as Appendix C, reported at 43 NY2d 933 (1978).

## Jurisdiction

The order of affirmance of the Court of Appeals of the State of New York was dated and entered February 22, 1978 and is set out in Appendix D.

The statutory provision believed to confer jurisdiction on this Court to review the order in question by writ of certiorari is 28 U.S.C. § 1257 (3).

## Statement in Compliance with Rule 23, Subdivision (1), Paragraph (f)

This action was commenced in State Court as an action for declaratory judgment pursuant to section 3001 of the New York Civil Practice Law and Rules. The Federal question sought to be reviewed was raised in the complaint, the initial pleading required by State law. The decision of the New York Supreme Court at Special Term and the Court of Appeals of the State of New York was based on the constitutionality of New York Tax Law, § 618 (4), as amended by section 2 of chapter 718 of the New York Laws of 1973.

## Question Presented

Is New York Tax Law, § 618 as amended by section 2 of chapter 718 of the Laws of 1973 in violation of the 5th and 14th Amendments of the United States Constitution because it retroactively disallows, in computing New York State taxable income of a resident trust, one-fifth of the reduction on the gains earned from the sale of long term capital assets where the transactions which produced the gains were fully consummated prior to the amendment?



## Provisions of the United States Constitution Involved

United States Constitution, Article V

> "Trials for crimes; just compensation for private property taken for public use. — No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Article XIV, Section 1

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Statutes of New York State Involved

New York Tax Law, § 618 as amended by chapter 718 of the Laws of 1973 and New York Tax Law, § 612 as amended by chapter 1 of the Laws of 1972 are reproduced as Appendix G.

## Statement of Case

New York Tax Law, § 612 was amended by chapter 1 of the Laws of 1972 during the second extraordinary session of the New York State Legislature, which session was held from December 27, 1971 to January 4, 1972. This session of the Legislature was convened by the Governor of the State of New York to deal with a serious financial crisis in the State finances and a mass transportation crisis in the Metropolitan New York area. The regular 1972 session of the New York Legislature began on January 5, 1972. Prior to 1972, under the provisions of New York Tax Law, Article 22, the New York State income tax on long-term capital gains of individuals, trusts and estates were reported and taxed on the same basis as they were taxed under

the Internal Revenue Code. Ordinarily only 50% of the net long-term capital gains were taxed as ordinary income in the same manner as wages and dividends. Chapter 1 of the Laws of 1972 amended New York Tax Law, § 612, effective for the calendar years commencing January 1, 1972 by adding paragraph (11) to subdivision (b).

Tax Law, § 612, as amended, provides in part:

> "§ 612. New York adjusted gross income of a resident individual
>
> "(a) General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.
>
> "(b) Modifications increasing federal adjusted gross income. There shall be added to federal adjusted gross income:
>
> * * *
>
> "(11) In the case of a taxpayer who has deducted one-half of the amount by which net long-term capital gain exceeds net short-term capital loss for the taxable year, one-fifth of the amount so deducted."

On June 11, 1973, chapter 718 of the Laws of 1973 was enacted. It amended Tax Law, § 618, effective for calendar years commencing January 1, 1972, by adding references to paragraph (11) of subdivision (b) of Tax Law, § 612, so as to provide in part:

> "§ 618. New York taxable income of a resident estate or trust
>
> "The New York taxable income of a resident estate or trust means its federal taxable income as defined in the laws of the United States for the taxable year, with the following modifications:
>
> * * *



> "(4) There shall be added or subtracted (as the case may be) the modifications described in paragraphs (6), (10) and (11) of subsection (b) and in paragraphs (11) and (13) of subsection (c) of section six hundred twelve."

## Facts

The plaintiff commenced an action for declaratory judgment by the personal service of a summons and verified complaint upon the State Tax Commission on August 9, 1976. By stipulation defendant's time to answer or otherwise move against the complaint was extended until September 13, 1976. On September 7, 1976, the plaintiff served an unverified amended complaint upon the State Tax Commission. On September 17, 1976, the State Tax Commission served by mail its answer to the amended complaint and brought this motion for dismissal of the amended complaint on the grounds that the plaintiff has failed to exhaust its administrative remedies and for summary judgment declaring Tax Law, § 618 as amended by chapter 718 of the Laws of 1973 constitutional.

The plaintiff filed a New York fiduciary income tax return for the year 1972 in which it reported a long-term capital gain of $1,335,206 from the sale of stock. It claimed a capital gain deduction of $667,603 or one-half of the total long-term capital gains, as shown on the schedule of its capital gains as follows:

| Kind of Property | Date Sold | Gross Sales Price | Cost or Other Basis and Cost of Improvements | Long-Term Gain or Loss |
|---|---|---|---|---|
| Polariod Corp. | 2/17/72 | $ 100,770.00 | $ 7,930. | $ 92,840.00 |
| United Brands | 2/17/72 | 5,485.00 | 20,289. | (14,804.00) |
| Xerox Corp. | 2/17/72 | 585,538.00 | 552. | 584,986.00 |
| Xerox Corp. | 3/23/72 | 672,811.00 | 627. | 672,184.00 |
| Total | | $1,364,604.00 | $29,398. | $1,335,206.00 |

It paid a tax in the amount of $127,308, as shown on its income tax return for 1972.

On July 29, 1974, the defendant issued a notice of deficiency and a statement of audit changes determining additional tax due in the amount of $19,359.40, plus interest of $1,869.54, for a total of $21,228.94 on the basis that:

> "[i]f you deduct one-half of the amount by which net long term capital gain exceeds the net short term capital loss in arriving at your total Federal income, 20% of such deduction must be added at Line 6 of Schedule 2 on Form IT-205. Therefore, 20% of $667,603.00 or $133,520.60 must be added to the New York taxable income reported."

The plaintiff filed a petition for an administrative hearing seeking a redetermination of the notice of deficiency. On October 16, 1975, the administrative hearing was held on the petition before the State Tax Commission.

Prior to the issuance of a final determination and on August 9, 1976, this action was commenced. The plaintiff sought a judgment:

> "[t] hat Section 618 of the Tax Law as it relates to Plaintiff's tax liability, for the year 1972 be declared ineffective, void, unconstitutional and unreasonable, and that Plaintiff not be bound thereby, and that an injunction issue compelling the Defendant to cease and desist from enforcing such Section as it relates to Plaintiff's tax liability for the year 1972 and fixing Plaintiff's tax liability for the yea· 1972 at the amount originally computed by Plaintiff in its return."

On August 13, 1976, the State Tax Commission issued a final determination sustaining the notice of tax deficiency for the year 1972 issued against the plaintiff.



The Supreme Court at Special Term in Monroe County in its judgment dated and entered March 2, 1977 declared the Tax Law, § 618 as amended in 1973 to be unconstitutional insofar as it applies retroactively to the respondent Holly S. Clarendon Trust's "1972 New York State income tax liability inasmuch as said retroactive amendment violates the 5th and 14th Amendments to the United States Constitution and Article I Section 6 of the New York State Constitution, * * *".

The petitioner New York State Tax Commission took a direct appeal to the Court of Appeals on March 21, 1977. The New York Court of Appeals by an order dated February 22, 1978, affirmed the judgment of the Supreme Court.

## REASONS FOR GRANTING THE WRIT

### I. *The amendment merely clarified a patent error.*

The imposition of the tax in issue in this case is upon income from long-term capital gains. Long-term capital gains are still given preferential tax treatment over earned income. In New York State, income earned on long-term capital gains prior to 1972 is subject to a tax which is 50% less than the tax imposed upon earned income. The 1972 change in the Tax Law merely reduced the preferential treatment to 40% instead of 50%. A deduction is a matter of legislative grace.

The plaintiff was on notice during 1972 of its actual tax liability. The instructions for filing the 1972 fiduciary income tax return (Appendix F) clearly points out that plaintiff was subject to the modification of the deduction previously allowed by New York. The additional tax liability of $19,359.40 would have been only an incidental consideration in deciding to realize a gain of $1,335,206.00 during the year 1972. No claim has been made that it could or would have taken some other action during 1972 to relieve itself of this additional tax liability.

Chapter 718 of the Laws of 1973 prevents the inequity of estates and trusts from having a tax advantage over individuals having the same type income and it is submitted that under the circumstances under which the increase in tax was laid justify the imposition of additional tax even if it is retroactive. It is submitted that the imposition of the tax upon the plaintiff's capital gains was not so harsh or oppressive as to transgress constitutional limitations.

The New York Court of Appeals in *Shapiro* v. *City of New York*, 32 NY2d 96 (1973), app. dsmd. 414 U.S. 804, rehearing denied 414 U.S. 1087, at page 105, said:

> "If such changes are forbidden in the name of equal protection legislatures in laying new taxes would be left powerless to rectify to any extent a previous distribution of tax burdens which experience has shown to be inequitable, even though constitutional. (*Welch* v. *Henry*, 305 U.S. 134, 144-145; see *Davis* v. *Ogden*, 117 Utah 315, 318-324 supra."

There is no constitutional prohibition which prevents a change in the rate of tax on capital gains. State legislatures have the power to tax, including the power to determine the class of persons to be taxed.

The bill jacket for chapter 718 of the New York Laws of 1973 contains a letter of Tax Commissioner Gallman to Governor Rockefeller, dated June 8, 1973 (Appendix E). The letter points out that:

> "Chapter 1 of the Laws of 1972 increased the amount of capital gains subject to the personal income tax imposed by Article 22 of the Tax Law from 50% to 60% of such gain. The memorandum, prepared by the Division of the Budget, submitted in support of the bill which became Chapter 1 makes it clear that the increase from 50% to 60% applied to all persons subject to tax under Article 22 which would include resident and nonresident estates and trusts. The memorandum does not mention excluding such taxpayers from this modification. To exclude estates and trusts would result in a windfall to them and give them preferential treatment as compared with other taxpayers.
>
> "The interpretation of the effect of Chapter 1 made by this Department was that such amendment also applied to estates and trusts. As a consequence, the returns and instructions for taxable years beginning on or after January 1, 1972 were prepared in accordance with that opinion. Because some question arose as to this interpretation and since we wished to clarify the law on this matter sections 2 and 3 of this bill were proposed."



Chapter 718 merely corrected an error in the draftsmanship in Chapter 1 of the Laws of 1972. It is submitted that a tax law which retroactively cures an administrative defect is not arbitrary and unconstitutional. (*Graham & Foster* v. *Goodcell*, 282 U.S. 409.) Even if through some error in draftsmanship the respondent could have escaped the liability which the Legislature evidently intended to impose, a claim that retroactive cure of patent error was inequitable and arbitrary would be without substance.

## II. *Retroactive income tax laws are not unconstitutional per se.*

The Court below in its judgment declared that Tax Law, § 618 as amended by section 2 of chapter 718 of the Laws of 1973 is unconstitutional in that it adds one-fifth of the long-term capital gain deduction taken on the federal income tax returns of resident trusts to state taxable income of resident trusts where the transactions which resulted in the capital gains were fully consummated prior to the said amendment of section 618, which became effective on June 11, 1973.

It is a generally recognized rule that mere retroactivity of a statute effecting taxation does not render it unconstitutional. Our research has disclosed no case which has ruled specifically

on the constitutionality of a statute which retroactively increases the tax on capital gains.

It was pointed out by Mr. Justice BRANDEIS in his dissenting opinion in *Untermeyer* v. *Anderson*, 276 U.S. 440 (1927), pp. 447, 448, that:

> "For more than half a century, it has been settled that a law of Congress imposing a tax may be retroactive in its operation. *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331; *Railroad Co.* v. *Rose*, 95 U.S. 78, 80; *Railroad Co.* v. *United States*, 101 U.S. 543, 549; *Flint* v. *Stone Tracy Co.*, 220 U.S. 107; *Billings* v. *United States*, 232 U.S. 261, 282; *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. 1, 20; *Lynch* v. *Hornby*, 247 U.S. 339, 343; *Hecht* v. *Malley*, 265 U.S. 144, 164. Each of the fifteen income tax acts adopted from time to time during the last sixty-seven years has been retroactive, in that it applied to income earned, prior to the passage of the act, during the calendar year. The Act of October 3, 1913, c. 16, 38 Stat. 114, 166, which taxed all incomes received after March 1, 1913, was specifically upheld in *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. 1, 20, and in *Lynch* v. *Hornby*, 247 U.S. 339, 343. Some of the acts have taxed income earned in an earlier year. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. 417, imposed an additional tax on incomes earned during the calendar year 1863, this additional tax being imposed after the taxes for the year had been paid. In *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, Mr. Justice Miller said: 'No one doubted the validity of the tax or attempted to resist it.' The Act of February 24, 1919, c. 18, Title II, 40 Stat. 1057, 1058-1088, which taxed incomes for the calendar year 1918, was applied, without question as to its constitutionality, in *United States* v. *Robbins*, 269 U.S. 315, and numerous other cases."

In *Welch* v. *Henry*, 305 U.S. 134 (1938), the Supreme Court upheld the constitutionality of a statute where, under the In-



come Tax Law of Wisconsin in force in 1933 and since, the amount of dividends received by a taxpayer from corporations whose "principal business" is "attributable to Wisconsin", *i.e.*, corporations which themselves have paid a Wisconsin income tax upon 50% or more of their total net income, may be deducted from gross income along with other deductions, in computing his taxable net income. A taxpayer, in his return for the year 1933, filed in March, 1935, made these deductions, the aggregate of which was such that he had no taxable income for that year. A year later, a statute was passed laying a tax on all dividends received in 1933 which, when received, were deductible from gross income. The taxpayer was thus required to pay a tax of $545 on his dividend income in 1933.

This Court said at page 147:

> "In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. *Nichols* v. *Coolidge*, 274 U.S. 531, 542; *Untermeyer* v. *Anderson*, 276 U.S. 440, 445 (citing *Blodgett* v. *Holden*, 275 U.S. 142, 147); *Coolidge* v. *Long*, 282 U.S. 582. Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy, *Milliken* v. *United States*, *supra*. In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before

it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation."

In *Milliken* v. *United States*, 283 U.S. 15 (1931), the petitioners' decedent gave certain corporate stock to his children in December of 1916. The donor died March 5, 1920. The petitioner objected to the tax imposed by the Revenue Act of 1918 as a denial of due process on account of retroactivity because it reached a gift prior to its enactment and because the tax levy rates were not in force when the gift was made and applied to the value of property not when given but at the uncertain later time of the death of the donor. The Court upheld the tax and pointed out at page 24 that:

> "The present gift was subject to the excise when made; and for reasons already indicated, we think mere increases in the tax, pursuant to a policy of which the donor was forewarned at the time he elected to exercise the privilege, did not change its character."

The Court in *Phillips* v. *Dime Trust & S.D. Co.*, 284 U.S. 160 (1931) said at pages 166-167:

> "The knowledge available before the creation of the estate that it was embraced within an established taxing system and that its taxation, on the same basis and in the same manner as decedent's estates, was an essential part of the system to prevent evasions, relieves the present tax on the present objection that it is arbitrarily retroactive."

Chapter 1 of the Laws of 1972 increased the amount of capital gains subject to the personal income tax imposed by Article 22 of the Tax Law from 50% to 60% of such gain. It appears clear that chapter 1 intended that the increase from 50% to 60% applied to all persons subject to tax under New York Tax Law, Article 22, including resident and nonresident estates and trusts. There was no legislative intent to exempt estates and trusts from the modifications reducing the deductions from income from capital gains from 50% to 60%.



Chapter 718 of the Laws of 1973 prevents the inequity of estates and trusts from having a tax advantage over individuals having the same type income and it is submitted that under the circumstances under which the increase in tax was laid justify the imposition of additional tax even if it is retroactive. It is submitted that the imposition of the tax upon the plaintiff's capital gains was not so harsh or oppressive to transgress constitutional limitation.

While the judgment of the New York Supreme Court, which was affirmed by the New York Court of Appeals, held that chapter 718 of the New York Laws of 1973 violated the "Fifth and Fourteenth Amendments of the United States Constitution and Article I, section 6 of the New York Constitution." A State statute is repugnant to the Due Process Clause of the New York State Constitution, is repugnant also to the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States. The clauses are formulated in the same words and are intended for the protection of the same fundamental rights of the individual and there is no room for distinction in definition of the scope of the two clauses. It is submitted, therefore, that the only reason that the New York Court of Appeals held chapter 718 in violation of the New York State Constitution is because it decided that it violated the Constitution of the United States. The courts of New York interpret the due process provisions of the New York State Constitution only in accordance with the due process provisions of the United State Constitution. It follows that the New York Court of Appeals was constrained to rule as it did because of the decisions applying to the Fifth and Fourteenth Amendments of the United States Constitution (see *Central Savings Bank* v. *City of New York*, 280 N.Y. 9 [1939]; *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 554-555 [1940]).

## CONCLUSION

**For the reasons stated, the Petition for a Writ of Certiorari should be granted.**

Dated: May 22, 1978

Respectfully submitted,

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# Appendices

## APPENDIX A — DECISION

## STATE OF NEW YORK — SUPREME COURT

## COUNTY OF MONROE

---

HOLLY S. CLARENDON TRUST,

*Plaintiff.*

*against*

THE STATE TAX COMMISSION OF THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

*Defendant.*

---

Motion by defendant to dismiss the complaint or for summary judgment in an action for declaratory judgment.

Crossmotion by plaintiff for summary judgment declaring the rights of the parties and for injunctive relief.

Judgment directed for plaintiff in accordance with memorandum of decision declaring the rights of the parties.

*APPEARNCES:*

Honorable Louis J. Lefkowitz, Attorney General of the State of New York, of Albany (Francis V. Dow, Assistant Attorney General, of counsel), attorney for defendant, in support of motion and in opposition to crossmotion.

Woods, Oviatt, Gilman, Sturman and Clarke, of Rochester (Eugene Parrs, of counsel), attorneys for plaintiff, in opposition to motion and in support of crossmotion.

## DECISION

This is an action for declaratory judgment wherein plaintiff seeks a declaration of the rights of the parties and injunctive relief. Defendant has moved to dismiss the complaint or in the alternative for summary judgment. Plaintiff opposes the motion to dismiss the complaint and has brought on a crossmotion for summary judgment granting the relief requested in the complaint. This being an action for declaratory judgment the rights of the parties will be determined and declared in this decision on these motions, there being no dispute as to the facts.

A brief statement of the underlying facts seems appropriate. Plaintiff is a simple inter vivos New York trust. During the months of February and March of 1972 the trust sold a substantial amount of its common stock from which was realized a net long term capital gain of $1,335,206. On or about March 20, 1973, the trust filed a timely 1972 New York State Fiduciary Income Tax return (Form IT-205) reflecting a taxable income of $667,003. In September 1973 the defendant State Tax Commission notified plaintiff that its taxable income for 1972 as a result of audit changes had been increased by $133,520.60 resulting in an adjusted taxable income of $800,523.60 with a proposed additional tax of $19,359.40, plus interest.

The defendant's proposed deficiency is based on the adjustment of the deduction for net long term capital gains. Prior to June 11, 1973, Section 618 of the Tax Law defined a resident's trust taxable income as its federal taxable income with several modifications. None of the then effective New York modifications affected the federal deduction of 50% of net long-term capital gains. Thus, when the trust's 1972 New York Fiduciary income tax return was filed, the trust took a deduction of 50% of its net long-term capital gains, amounting to $667,003.



On June 11, 1973, by Section 2 of Chapter 718 of the 1973 Laws of New York, the legislature amended Section 618 of the Tax Law. The amendment redefined the statutory definition of a resident trust's taxable income by adding another New York modification of federal taxable income. This new modification provided that to federal taxable income there must be added:

> "In the case of a taxpayer who has deducted one-half of the amount by which net long term capital gain exceeds net short term capital loss for the taxable year, one-fifth of the amount so deducted." Tax Law Section 612(b)(11).

Section 612(b)(11) of the Tax Law is made applicable to trusts by Section 618(4). The amendment passed on June 11, 1973 was stated to be effective to all taxable years beginning on or after January 1, 1972.

The effect of this June 11, 1973 amendment is to allow only a 40% deduction for net long term capital gains, rather than a 50% deduction.

In its 1972 instruction booklet to Form IT-205, a trust's income tax return, the Tax Commission indicated that the increased capital gains tax must be paid. There was no statutory authority for such provision prior to June 11, 1973.

The trust refused to pay the proposed increase in tax and the Tax Commission issued its Notice of Deficiency. On October 22, 1974, the trust filed a timely petition with the Tax Commission protesting the deficiency and requesting a formal hearing. On October 16, 1975, that hearing was held in Rochester, New York. The attorneys for the trust argued that the retroactive application of the amendment to Section 618 of the Tax Law violated the due process guarantees of the 5th and 14th Amendments of the United States Constitution and Article I Section 6 of the New York Constitution.

While awaiting the decision of the Tax Commission, the plaintiff commenced this action in August 1976 for a judgment declaring the retroactive amendment to Section 618 of the Tax Law unconstitutional. The tax Commission decision was issued on August 13, 1976. The pertinent conclusion of the Tax Commission was in part as follows:

> ". . . That the State Tax Commission has no jurisdiction to declare a Tax Law unconstitutional. The unconstitutionality of the Tax Law is presumed at the administrative level of adjudication. . . ."

Thus, the trust's petition was rejected and the amendment to Section 618 of the Tax Law was upheld by the State Tax Commission.

In September 1976 the defendant served its answer to the complaint in this action and has moved herein for dismissal thereof or summary judgment on the grounds that: (a) the plaintiff must pursue its action under Article 78 of the CPLR; (b) Section 618 of the Tax Law was amended by implication or inference in January 1972; and (c) the contested statute is constitutional.

The plaintiff thereafter served its affidavit in opposition to defendant's motion for summary judgment and Notice and affidavit in support of its crossmotion for summary judgment in this action for declaratory judgment.

Before discussing the issue of the constitutionality of the 1973 amendment to Tax Law, Section 618, I cannot resist quoting from a reported decision of the Court of Appeals, Ninth Circuit, per Circuit Judge Koelsch, where it is said, in part,

> ". . . The applicable Civil Air Regulations are not a paragon of logical organization of graphic lucidity, yet they are not hopelessly unintelligible. . . ." *Underwriters et Lloyd's of London* v. *Cordova Airlines*, 283 F. 2d 659 (1960).



I have the same reaction to the provisions of the New York State Tax Law as Judge Koelsch had to the Civil Air Regulations.

Plaintiff contends that the 1973 amendment to Tax Law, Section 618, is unconstitutional insofar as it is applied retroactively to the 1972 income of this resident trust, in that it is repugnant to the due process guarantees of Article I Section 6 of the New York Constitution and the 5th and 14th Amendments to the United States Constitution.

Defendant contends that the statute is not constitutionally defective and raises a preliminary procedural question as to the availability to the plaintiff of this declaratory judgment action by reason of Tax Law, Section 690, which in substance states that the exclusive remedy of a taxpayer for review of a decision of the Tax Commission is by way of an Article 78 proceeding. Defendant's objection to this action on this procedural ground may not be sustained. Notwithstanding the stated exclusiveness of an Article 78 proceeding as the only remedy, a declaratory judgment action may properly be maintained in a case where a constitutional question is involved or the legality or meaning of a statute is in question and there is no issue as to the facts. *Slater* v. *Gallman*, 38 NY2d 1 (1975); *First National City Bank* v. *City of New York*, 36 NY2d 87 (1975); *Richfield Oil Corp.* v. *City of Syracuse*, 287 N.Y. 234 (1942); *Dun & Bradstreet, Inc.* v. *City of New York*, 276 N.Y. 198 (1937).

Defendant's contention that the amendment of the Tax Law, Section 612, by Chapter 1, Section 9, Laws of 1972, was intended by the legislature to apply to resident trusts, is specious. Section 612 clearly and expressly applies only to resident individuals. Neither Commissioner Gallman's letter to the Governor, dated June 8, 1973, nor the Department's 1972 instruction handbook to Form IT-205 can alter the legislature's

clear restriction of the 1972 amendment to resident individuals. Only the legislature has power to enact tax laws and the power cannot be delegated. (*Elmhurst Fire Co.* v. *City of New York*, 213 N.Y. 87, 89; *Gautier* v. *Ditmar*, 204 N.Y. 20, 26, 27). There may be no taxation by implication. (*Frank* v. *Davidson*, 155 Misc. 382, 383). Finally, taxing statutes of doubtful meaning are to be construed in favor of the taxpayer. (*Matter of American Cyanamid & Chemical Corp.* v. *Joseph*, 308 N.Y. 259, 263).

Passing to the merits, while I find no case, federal or state, which has ruled on the constitutionality of statutes retroactively taxing capital gains resulting from sales of stock, which were voluntarily made and fully consummated, I believe that the rationale of the United States Supreme Court decisions ruling upon the constitutionality of retroactive taxing statutes purportedly applying to gifts fully consummated and retroactive taxing statutes purporting to subject transfers of a decedent's property, fully consummated prior to the enactment of the statute, to be controlling. (*Welch* v. *Henry*, 305 U.S. 134, 147, 148; *Untermeyer* v. *Anderson*, 276 U.S. 440; *Blodgett* v. *Holden*, 275 U.S. 142.)

The same principles have been held to apply to amendments to estate tax laws providing for inclusion in the gross estate for purposes of computation of tax, property indefeasibly vested in a transferee by gift during the decedent's lifetime. (*White* v. *Poor*, 296 U.S. 98; *Helvering* v. *Helmholz*, 296 U.S. 93; *Coolidge* v. *Long*, 282 U.S. 582; *Nichols* v. *Coolidge*, 274 U.S. 531).

Retroactivity, alone, does not taint a statute, but where the statute taxes the result of a voluntary act fully consummated prior to the enactment of the statute, the resulting taxation is so harsh, arbitrary and oppressive as to violate due process and I



believe that the same reasoning applies to a retroactive increase in the percentage of capital gains subject to tax, where the increase results from sales voluntarily made.

In my opinion, plaintiff is entitled to a judgment declaring Tax Law Section 618 as amended by Section 2 of Chapter 718, Laws of 1973, unconstitutional insofar as it retroactively adds one-fifth of the long term capital gain deduction taken on the federal income tax returns of resident trusts to state taxable income of resident trusts where the transactions which resulted in the capital gains were fully consummated prior to the said amendment of Section 618, which became effective June 11, 1973, and an injunction permanently restraining the State Department of Taxation and Finance from endeavoring to collect additional tax by reason of such prior transactions should be granted. The unconstitutionality of the amendment as applicable to such consummated transactions is that it is so harsh, arbitrary and oppressive as to contravene the due process clauses of the 5th and 14th Amendments to the United States Constitution and Section 6, Article I, of the New York State Constitution.

Judgment is directed declaring that the aforesaid 1973 amendment to Tax Law, Section 618(4), is unconstitutional insofar as its retroactive application to plaintiff's 1972 New York State income tax liability is concerned and that plaintiff is entitled to the allied injunctive relief requested in its complaint.

Let judgment enter accordingly.

Dated: February 28, 1976.

s/ ARTHUR ERVIN BLAUVELT
*Justice Supreme Court*

## APPENDIX B—JUDGMENT OF SUPREME COURT

At a Special Term of the Supreme Court, held in and for the County of Monroe, at the Hall of Justice, in Rochester, New York, on September 29, 1976

PRESENT: HON. ARTHUR ERVIN BLAUVELT, JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK—SUPREME COURT
COUNTY OF MONROE

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HOLLY S. CLARENDON TRUST,

*Plaintiff,*

—against—

THE STATE TAX COMMISSION
THE DEPARTMENT OF TAXATION AND
FINANCE OF THE STATE OF NEW YORK,

*Defendant.*

Index No. 11100/76

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An action having been brought by the Plaintiff Holly S. Clarendon Trust against Defendant State Tax Commission for a declaratory judgment regarding the constitutionality of a 1973 amendment to Section 618(4) of the Tax Law, and

A motion for summary judgment having been brought by the defendant to dismiss the complaint or for summary judgment in the action for declaratory judgment, and

A crossmotion for summary judgment having been brought by the Plaintiff to declare the rights of the parties and for injunctive relief, and





Defendant's motion and plaintiff's crossmotion having come to be heard before the Honorable Arthur Ervin Blauvelt, Justice of the Supreme Court, without jury at a Special Term of this Court on September 29, 1976, and the issues having been duly tried on that day, and the plaintiff having duly appeared by Woods, Oviatt, Gilman, Sturman & Clarke, Eugene Parrs, Esq., of counsel, and the defendant having appeared by the Attorney General of the State of New York, Francis V. Dow, Assistant Attorney General, of counsel and

Upon all the pleadings, the affidavit of Francis V. Dow, sworn to on September 17, 1976, the affidavit of John S. Gilman in support of plaintiff's crossmotion for summary judgment, sworn to on September 23, 1976, the affidavit of John S. Gilman in opposition to defendant's motion for summary judgment, sworn to on September 23, 1976, and the memoranda of law submitted by counsel for the plaintiff and counsel for the defendant, and this Court's decision dated February 28, 1977, now, it is

ORDERED, ADJUDGED AND DECREED, that the 1973 amendment to Section 618 (4) of the Tax Law, effected by Section 2 of Chapter 718 of the 1973 Laws of New York, is unconstitutional and void insofar as it applies retroactively to plaintiff's 1972 New York State income tax liability inasmuch as said retroactive amendment violates the 5th and 14th Amendments to the United States Constitution and Article I Section 6 of the New York State Constitution, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant be and is hereby injoined from enforcing such unconstitutional application of Section 618 (4) of the Tax Law as it relates to plaintiff's 1972 New York State income tax liability, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff's 1972 New York State income tax liability be fixed at the amount originally computed by the plaintiff on its return as filed for that year.

Dated: March 2, 1977
ENTER: /s/ ARTHUR ERVIN BLAUVELT
Justice of the Supreme Court

Judgment entered this 3rd day of March, 1977.

/s/ F. ROSS ZORNOW,
Clerk, Monroe County, New York

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## APPENDIX C—MEMORANDUM OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

HOLLY S. CLARENDON TRUST, Respondent, v.
STATE TAX COMMISSION, Appellant.

Argued January 13, 1978;
decided February 22, 1978

### OPINION OF THE COURT

*Per Curiam.*

Judgment affirmed, with costs. Facile categorization of taxable transactions as "voluntary" or "involuntary" does not progress the analysis. Even property taxes and income taxes involve voluntary acts — the decision to own property or to earn, rather than to forego, income.





Retroactivity provisions in tax statutes, if for a short period, are generally valid, but the constitutional analysis must involve a balancing of equities. Arbitrariness in a tax statute, it has been held, deprives taxpayers of property without due process of law (*People ex rel. Best & Co. v Graves*, 265 NY 431, 436). Although a close question is presented, the apparent absence of a persuasive reason for retroactivity, with its potentially harsh effects, offends constitutional limits, especially when the tax imposed is one which might exert significant influence on personal or business transactions (cf. *Welch v Henry*, 305 US 134, 147, and cases cited, reh den 305 US 675; *People ex rel. Best & Co. v Graves*, 265 NY 431, 436, *supra*). Also somewhat influential, but hardly determinative, is the lapse of an entire legislative session before the apparent "error" was corrected (cf. *Welch v Henry*, 305 US 134, 150-151, *supra*).

Reference (inaccurately) to the new, higher, tax rate in the instruction booklet for the 1972 fiduciary income tax return does not help the Tax Commission. At best, the instructions provided potential taxpayers with notice to look to the statutes, which imposed no increase. The legislative error, if that it was, could be corrected only by further legislation, not by self-serving publication in an instruction booklet.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur in *Per Curiam* opinion.

Judgment affirmed.

## APPENDIX D—ORDER OF COURT OF APPEALS

**Court of Appeals**
**State of New York**
***The Hon. Charles D. Breitel, Chief Judge, Presiding***

Supreme Court — Monroe Co.

No. 67

Holly S. Clarendon Trust,

*Respondent,*

vs.

The State Tax Commission,

*Appellant.*

The appellant in the above entitled appeal appeared by Louis J. Lefkowitz, Attorney General of the State of New York; the respondents appeared by Woods, Oviatt, Gilman, Sturman & Clarke.

The Court, after due deliberation, orders and adjudges that the judgment is affirmed, with costs. Opinion Per Curiam. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Monroe County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

SEAL

/s/ DONALD M. SHEROW,
Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 22, 1978.



## APPENDIX E — LETTER FROM NORMAN GALLMAN

June 8, 1973

The Honorable Nelson A. Rockefeller
Governor of New York
State Capitol
Albany, New York 12224

Dear Governor Rockefeller:

Re: *Assembly Bill No. 3984*

This supplements my letter of May 31, 1973 concerning Assembly Bill No. 3984 which was introduced at the request of this Department.

The Tax Section of the New York State Bar Association in Report No. 359 has recommended that this bill be disapproved. This report reverses the recommendation of approval in Report No. 219. The Bar Association objects to the application of sections 2 and 3 of the bill to taxable years beginning on or after January 1, 1972 which have ended. The Bar Association submits that this bill will have the effect of retroactively modifying the New York taxable income for such years. We submit that the Bar Association's comment is without merit.

Chapter 1 of the Laws of 1972 increased the amount of capital gains subject to the personal income tax imposed by Article 22 of the Tax Law from 50% to 60% of such gain. The memorandum, prepared by the Division of the Budget, submitted in support of the bill which becomes Chapter 1 makes it clear that the increase from 50% to 60% applied to all persons subject to tax under Article 22 which would include resident and nonresident estates and trusts. The memorandum does not mention excluding such taxpayers from this modification. To exclude estates and trusts would result in a windfall to them and give them preferential treatment as compared with other taxpayers.

The interpretation of the effect of Chapter 1 made by this Department was that such amendment also applied to estates and trusts. As a consequence, the returns and instructions for taxable years beginning on or after January 1, 1972 were prepared in accordance with that opinion. Because some question arose as to this interpretation and since we wished to clarify the law on this matter sections 2 and 3 of this bill were proposed.

I understand that virtually all the returns filed for taxable years beginning on or after January 1, 1972 have been filed in accordance with this Department's instructions. Such instructions, in accordance with our opinion of the intent of Chapter 1 of the Laws of 1972, were prepared as if this bill was not necessary and state that 60% of capital gains is taxable to estates and trusts. Therefore, resident and nonresident estates and trusts will not have to modify their New York taxable income as stated in the Bar Association's letter. To the contrary, if this bill does not become law, this Department may have to process a refund claim for every estate and trust reporting capital gains. Several banks and trust companies, which have filed returns for taxable year 1972, have submitted letters stating that if the Governor does not approve this bill their transmittal is to be considered a request for a refund. While we do not have figures available for taxable years beginning on or after January 1, 1972, for the taxable year 1971 about 40,000 fiduciary returns were filed. Of the 40,000 returns, one-half reported long term capital gains.

If the bill is not signed, it will place some $10,000,000 in expected revenue in jeopardy since the same argument will be used with respect to a bill introduced in 1974 with an effective date which encompasses 1973 taxable years. In addition, if



litigation develops, it may be inadvisable to introduce another bill until the litigation is resolved. Consequently, further revenue will be placed in jeopardy.

While I do not believe this bill is retroactive but, rather, is clarifying in nature, even if it were retroactive, retroactivity of about a year has been held to be reasonable. (*Lacidem Realty Corporation v. Graves*, 288 N.Y. 354) Also, retroactivity would be particularly justified here to prevent preferential treatment from being given to estates and trusts.

For all the foregoing reasons, I strongly urge that this bill receive executive approval.

Sincerely,

s/ NORMAN GALLMAN
Norman Gallman
Commissioner

APPENDIX F

# 1972 Instructions for Form IT-205 New York State Fiduciary Return

# IT-205-I

**NY State Department of Taxation and Finance Income Tax Bureau**

# General Instructions

## Who must file

The fiduciary of a **resident** estate or trust must file a return on Form IT-205 if the estate or trust (1) is required to file a Federal income tax return for the taxable year or (2) had any New York taxable income for the taxable year or if, for minimum income tax purposes, the estate or trust has any items of tax preference in excess of the specific deduction. (See Form IT-220 — Minimum Income Tax below.)





The fiduciary of a **nonresident** estate or trust must file a return on Form IT-205 if the estate or trust had income or gain derived from New York State sources in excess of its New York exemption ($600) or if, for minimum income tax purposes, the estate or trust has any items of tax preference derived from or connected with New York sources in excess of the specific deduction. (See Form IT-220 — Minimum Income Tax below.)

Income from NY State sources includes income or gains from:

1 Real or tangible personal property located within the State,

2 A business, trade, profession or occupation carried on within the State,

3 Services performed within the State.

It does not include:

1 Annuities, interest, dividends or gains from the sale or exchange of intangible personal property, unless part of the income from a business, trade, profession or occupation carried on in New York State,

2 Compensation received in respect of a nonresident decedent for active service in the military forces of the United States.

**Form IT-205-A,** Fiduciary Allocation Schedule, must be completed and attached to the Form IT-205 which is filed for (1) a nonresident estate or trust having income or gain derived from New York State sources or (2) a resident estate or trust with a nonresident beneficiary (except as noted below under FORMS TO BE FILED). Copies of Form IT-205-A may be obtained at any office of the Department of Taxation and Finance listed in these instructions.

## Resident and Nonresident Estates and Trusts defined

For purposes of the New York income tax, estates and trusts are either (a) resident estates and trusts or (b) nonresident estates and trusts. If, at the time of his death, a decedent was domiciled in New York State his estate is a resident estate and any trust created by his will is a resident trust. If an irrevocable trust consists of property of a person domiciled in New York State when such property was transferred to the trust it is a resident trust.

The term "resident trust" also includes (1) any revocable trust consisting of property of a person domiciled in New York State at the time such property was transferred to the trust if it



has not subsequently become irrevocable and (2) any revocable trust which has subsequently become irrevocable if the trust consists of property of a person domiciled in this State when it became irrevocable. For purposes of the preceding sentence a trust is revocable if it is subject to a power, exercisable immediately or at any future time, to revest title in the person whose property constitutes the trust and a trust becomes irrevocable when the possibility that such power may be exercised has terminated.

Any estate or trust which is not a resident estate or trust as defined in this instruction is a nonresident.

The residence of the fiduciary does not affect the classification of an estate or trust as resident or nonresident.

### Change of Residence of Trust

If the person whose property constitutes a revocable trust has changed his domicile from or to New York State between the time of transfer of such property to the trust and the time it becomes irrevocable the residence of the trust shall be deemed to have been changed at the date it ceases to be revocable. In such a case the fiduciary shall, for the taxable year in which the change of status of the trust occurs, file

one return as a resident trust for the portion of the year during which the trust is a resident trust and one return as a nonresident trust for the portion of the year during which the trust is a nonresident trust. The income and other information required to be shown in the resident return shall be determined as if the taxable year of the trust for Federal income tax purposes were limited to the period of resident status. The nonresident return is likewise completed as though the taxable year of the trust for Federal income tax purposes were limited to the period of nonresident status. Each separate return must reflect the special accruals provided by Section 654(c) of the Tax Law. In addition, the New York exemption of the trust allowable under Section 618 and Section 638 shall be prorated between the two returns.

Where two returns for one taxable year are filed in accordance with the foregoing the tax due on the New York taxable income of the fiduciary shall not be less than it would have been if the total taxable income of the fiduciary shown in the two returns were included in a single return.

## Forms to be filed

Forms IT-205 and IT-205-A (and schedules therein) should be completed for estates and trusts, as follows:



**a) Resident Estate or Trust with Resident Beneficiaries Only**

Complete all of Pages 1 and 2 of Form IT-205.

**b) Resident Estate or Trust with Any Nonresident Beneficiaries**

1 Complete all of Pages 1 and 2 of Form IT-205.

2 Report in Schedule 1, Page 1 of Form IT-205 the names and addresses of all beneficiaries, both resident and nonresident, to whom income is distributable, whether or not the income is taxable to the nonresident beneficiaries.

3 Complete Schedules 9, 10, 11 and 12 of Form IT-205-A and any of Schedules 13, B, D and Schedule D Supplement of Form IT-205-A which are applicable, unless **none** of the income distributable to the nonresident beneficiaries is derived from **New York** sources. In this case Form IT-205-A need not be completed even though **other** income is distributable to nonresident beneficiaries.

4 If Form IT-205-A is not required because of (3) above, include a statement with Form IT-205 to the effect that the distributable income of the nonresident beneficiaries consists only of income which is not taxable to nonresident individuals.

**c) Nonresident Estate or Trust with Nonresident Beneficiaries Only**

1 Complete Page 1 of Form IT-205 except Schedules 2 and 4.
2 Complete Schedules 8, 9, 10, 11 and 12 of Form IT-205-A.
3 Complete any of Schedules 13, B, D and Schedule D Supplement of Form IT-205-A which are applicable. (See instructions for Form IT-205-A.)

**d) Nonresident Estate or Trust with Any Resident Beneficiaries**

1 Complete all of Form IT-205, except Schedules 2 and 5.
2 Complete Schedules 8, 9, 10, 11 and 12 of Form IT-205-A.
3 Complete any of Schedules 13, B, D and Schedule D Supplement of Form IT-205-A which are applicable. (See instructions for Form IT-205-A.)

**e) Special Rule Where Entire Income is Taxable to Fiduciary**

If **all** of the income of the estate or trust is taxable to the fiduciary for the 1972 taxable year, no entries are required in Schedule 1 on Page 1 of Form IT-205.



**Form IT-220 — Minimum Income Tax Computation Schedule** — If the estate or trust has any items of tax preference in excess of the specific deduction, file Form IT-220 with Form IT-205. The specific deduction is that percentage of $5,000 which the total New York items of tax preference (and related modifications) attributable to the fiduciary is to the total Federal items of tax preference of the estate or trust. Form IT-220 may be obtained at any office of the Department of Taxation and Finance. (See Tax Law Section 622.)

**Exempt Trusts** — A trust which is taxable as a corporation for Federal income tax purposes is exempt from New York State personal income tax under Article 22. A trust which, by reason of its purposes or activities, is exempt from Federal income tax is exempt from tax under Article 22 (regardless of whether it is subject to Federal and State income tax on unrelated business taxable income).

**Tax returns for Individuals** — Every fiduciary who acts for an individual whose entire income is in his charge (as, for example, a guardian or committee for an incompetent person), must make a return, (1) for a resident individual, on the appropriate individual resident form, if a

Federal income tax return is required to be filed for the taxable year or if the individual had total New York income in excess of his exemptions, or (2) for a nonresident individual, on the appropriate individual nonresident form, if his total New York income is in excess of his exemptions. In such cases, the fiduciary must pay the tax due. Returns are also required if, for minimum income tax purposes, a resident individual has items of tax preference in excess of the specific deduction or if a nonresident individual has items of tax preference derived from or connected with New York sources in excess of the specific deduction. (See Tax Law Section 622.)

**Tax returns for Decedents** — A return must be made by the executor, administrator or other representative of a taxpayer who died during the taxable year on the form which would have been appropriate had he lived. (See "Tax returns for Individuals," above, for requirements for filing.)

**Treatment of Accumulation Distribution** — A beneficiary whose New York adjusted gross income includes an accumulation distribution from a trust is allowed a tax credit on his New York State individual income tax return for the income tax previously paid by the trust attrib-



utable to such accumulation distribution. The credit may not reduce the beneficiary's tax to an amount less than would have been due if the accumulation distribution were excluded from his New York adjusted gross income. (See Tax Law Sections 621 and 640.)

Where an accumulation distribution has been made, there should be attached to the return of the trust a copy of Federal Schedule J (Form 1041) and a statement showing the computation of the credit claimed with respect to each beneficiary involved.

**When to file** — The due date is April 15, 1973 for returns filed for the calendar year 1972, and the 15th day of the fourth month following the close of the taxable year for returns filed for a period other than the calendar year.

**Where to file** — File all returns with the **New York State Income Tax Bureau, The State Campus, Albany, N. Y. 12227.**

**Where to get forms and information** — You may get forms and necessary information from the Income Tax Bureau, The State Campus, Albany, New York 12227 or from any District Tax Office listed below. Most New York State banks also have income tax forms available.

| Office | Phone | ZIP Code |
|---|---|---|
| Albany<br>The State Campus | 457-7000 | 12227 |
| Binghamton<br>184-186 Court St. | 723-7441 | 13901 |
| Bronx<br>1375 Jerome Ave. | 992-7865 | 10452 |
| Brooklyn<br>350 Livingston St. | 834-5500 | 11217 |
| Buffalo<br>State Office Bldg., 65 Court St. | 842-4534 | 14202 |
| Mineola<br>114 Old Country Road | 741-0950 | 11501 |
| New York City<br>State Office Bldg., 80 Centre St. | 488-3400 | 10013 |
| Queens<br>97-77 Queens Blvd., Rego Park | 275-7500 | 11374 |
| Rochester<br>1 Marine Midland Plaza | 546-3050 | 14604 |
| Syracuse<br>333 East Washington St. | 474-5951 | 13202 |



| | | |
|---|---|---|
| Utica<br>207 Genesee St. | 797-6120 | 13501 |
| White Plains<br>99 Church St. | 948-8700 | 10633 |

**Unincorporated Business Tax** — Form IT-202 is an unincorporated business tax return and must be filed in addition and attached to Form IT-205 if the estate or trust carries on an unincorporated business within New York State and has unincorporated business gross income of more than $10,000 or any amount of unincorporated business taxable income. Unincorporated business taxable income is the excess of unincorporated business gross income over the aggregate of unincorporated business deductions and unincorporated business exemptions.

A declaration of estimated unincorporated business tax must be filed on Form IT-2105 for the estate or trust for 1973 if it is expected that unincorporated business taxable income will exceed $2,500.

**Research and Development — Special Depreciation — Section 612(g) of the Tax Law**

The estate or trust may elect to deduct depreciation not in excess of twice that allowed for

Federal purposes on certain property acquired before 1969 **or** any amount expended during the taxable year for the construction, erection or acquisition of certain qualifying property used for research and development purposes. (See Form IT-211 (Inst.) for instructions.)

**Payments for Charitable Purposes — Effect on Fiduciary Adjustment** — The fiduciary adjustment determined as required in Schedule 7 of this form does not include the modifications under paragraphs (1) and (2) of Section 612(b) and paragraphs (1), (2), (4), (5), (6) and (7) of Section 612(c) of the Tax Law with respect to any amount paid or set aside for a charitable purpose during the taxable year. (See instructions for Schedule 7 on Page 4.)

**Use of federal figures** — The return and instructions for Form IT-205 provide that income and deductions are to be entered as reportable for Federal income tax purposes. However, all items reported on Form IT-205 or on statements or schedules attached thereto are subject to audit and revision by the Tax Commission.

**Whole dollar amounts** — The money items may be shown as whole dollar amounts. Any amount under 50 cents may be eliminated and any amount that is 50 cents or more must be increased to the next highest dollar. The computation of balance of tax due or overpayment must be based on exact amounts.



**Penalties** — The law imposes penalties for failing to file a return or to pay any tax when due or for making a false or fraudulent return or for making a false certification. The mere fact that the figures reported on the State return are taken from the Federal return will not relieve the taxpayer from the imposition of penalties because of negligence or for filing a false or fraudulent return.

**Accounting periods and methods** — The accounting period for which Form IT-205 is filed and the method of accounting used are the same as for Federal income tax purposes. If the taxable year or method of accounting is changed for Federal income tax purposes, such change applies similarly to the State fiduciary return.

**Federal changes** — If on audit of the fiduciary return, the Federal Government changes any item of income, deduction or items of tax preference reported to the Internal Revenue Service or the shares of income distributable to the beneficiaries, the fiduciary must report the change to the New York State Income Tax

Bureau within 90 days after the date of the final determination of the change. Such notification must be submitted on Form IT-115 which may be obtained at the Albany Office of the Income Tax Bureau or at any District Office.

Form IT-115 must be filed separately and not attached to any return. It must be accompanied by a remittance for the amount of any tax and interest due.

If an amended Federal return is filed, reflecting a change in taxable income or items of tax preference of the fiduciary or in shares of income distributable to the beneficiaries, an amended State return also must be filed within 90 days.

# Specific Instructions

See "FORMS TO BE FILED" under General Instructions with respect to estates or trusts which are required to attach Form IT-205-A to the Fiduciary Return on Form IT-205.



Print or type the required information in the address box at the top of Page 1. If the estate or trust has an Employer's Identification Number, enter it in the space provided to the right of the address box. Complete applicable items A through E near the top of the page.

## Schedule 1

## Names and addresses of beneficiaries

Enter in Columns 1, 2 and 3 the name, address and identifying number of each beneficiary of the estate or trust. If a beneficiary is a nonresident, check the box to the right of his name. In completing Schedules 4 and 6 of this return, use the same letter (a, b, c or d) when referring to a beneficiary as is used in Schedule 1. If there are more than four beneficiaries, attach a schedule in form similar to Schedule 1, identifying additional beneficiaries by consecutive letters.

## Schedule 2

## Computation of New York taxable income of resident estate or trust

**Line 1 / Federal taxable income of fiduciary:** Enter the exact amount of the taxable income of fiduciary as reported on Line 23 of Schedule 5 on Page 2.

**Line 4 / New York exemption:** An exemption of $600 is allowed every estate or trust, in lieu of the Federal exemption, which is $600 in the case of an estate and either $100 or $300 in the case of a trust.

**Line 6 / New York modifications relating to amounts allocated to principal:** The following amounts are to be added or subtracted on this line to the extent they are attributable to amounts which are not includible in Federal distributable net income of the estate or trust (give full details in an attached statement):

a) Subtract the portion of any gain from the sale or other disposition of (a) property which had a higher basis for New York State income tax purposes than for Federal income tax purposes on December 31, 1959 (or on the last day of a fiscal year ending during 1960), and (b) property held in connection with mines, oil or gas wells and other natural deposits which has a higher adjusted basis for New York State income tax purposes than for Federal income tax purposes, which does not exceed such difference in basis. However, if the gain is considered a long-term capital gain for Federal income tax purposes, the subtraction is limited to 60% of such portion of the gain.

b) Subtract the amount of any gain which was properly included in gain reported on a prior New York State income tax return under Article 16 of the Tax Law by the decedent or the estate or trust or by another estate or trust from which the taxpayer received such gain.

c) Add 20% of the net long-term capital gain deduction on Schedule 5, Line 20 to the extent allocable to principal.



d) Add any deduction for percentage depletion in connection with mines, oil and gas wells and other natural deposits used in arriving at the Federal taxable income of the fiduciary. Subtract cost depletion pursuant to I.R.C. Section 611 on such property.

e) Expenditures pursuant to an election under Section 612(h) of the Tax Law in connection with waste treatment facilities or air pollution control equipment, the construction, reconstruction, erection or improvement of which was initiated (in the case of waste treatment facilities) on or after January 1, 1965 and (in the case of air pollution control equipment) on or after January 1, 1966. This subtraction applies only to depreciable, tangible business property located in New York State and certified under the provisions of the Public Health Law. This subtraction is not permitted when the election under Section 612(g) of the Tax Law has been exercised on such property.

If an election under Section 612(h) of the Tax Law has been exercised, enter on Line 6 any amounts deducted for Federal income tax purposes for expenditures or for depreciation or amortization on the same property, to the extent they are attributable to items not reflected in Federal distributable net income. Such amounts are to be treated as an item of addition on Line 6.

For possible modifications under Section 612(g) of the Tax Law for optional depreciation and research and development expenditure deductions attributable to corpus items, see General Instructions.

**Line 8 / Fiduciary's share of New York Fiduciary Adjustment:** Enter on this line the total of the Fiduciary's share of New York Fiduciary adjustment plus any modification for allocable expenses which is required to be made under Section 618(5) of the Tax Law. (See Form IT-220 and related instructions.)

## Schedule 3
## Computation of tax

**Line 1 / New York taxable income of fiduciary:** Enter amount from Line 9, Schedule 2, if a resident estate or trust, or amount from Form IT-205-A, Line 12, Schedule 8, if a nonresident estate or trust.

**IMPORTANT — Line 2**

If an investment credit under Section 606(a) of the Tax Law is claimed against the tax payable by the fiduciary **do not** enter any amount in Line 2. Follow instructions for Form IT-212 instead.

**Line 2 / Tax on amount on line 1:** Compute the tax in accordance with the following tax rate schedule. Enter the tax on Line 2.

## New York Tax Rate Schedule

| If the amount on line 1 is: over | not over | enter on line 2 |
|---|---|---|
| $ 0 | $1,000 | 2% of amount on line 1 |
| 1,000 | 3,000 | $20 plus 3% of excess over $1,000 |
| 3,000 | 5,000 | 80 plus 4% " " " 3,000 |
| 5,000 | 7,000 | 160 plus 5% " " " 5,000 |
| 7,000 | 9,000 | 260 plus 6% " " " 7,000 |



| | | | | | | |
|---|---|---|---|---|---|---|
| 9,000 | 11,000 | 380 plus | 7% | " | " | 9,000 |
| 11,000 | 13,000 | 520 plus | 8% | " | " | 11,000 |
| 13,000 | 15,000 | 680 plus | 9% | " | " | 13,000 |
| 15,000 | 17,000 | 860 plus | 10% | " | " | 15,000 |
| 17,000 | 19,000 | 1,060 plus | 11% | " | " | 17,000 |
| 19,000 | 21,000 | 1,280 plus | 12% | " | " | 19,000 |
| 21,000 | 23,000 | 1,520 plus | 13% | " | " | 21,000 |
| 23,000 | 25,000 | 1,780 plus | 14% | " | " | 23,000 |
| 25,000 | | 2,060 plus | 15% | " | " | 25,000 |

**Tax Surcharge** — A tax surcharge of 2½% (.025) is imposed on the tax reported on Line 2 and on the minimum income tax. This tax surcharge is to be entered on Line 3. **Read the instructions below before making an entry on Line 3.**

**Line 3 / Minimum Income Tax, Tax Surcharge, Unincorporated Business Tax, etc.** If any minimum income tax is due from Form IT-220, add the amount of minimum income tax and the tax reported on Line 2 and multiply this total by 2½% (.025) tax surcharge. If no minimum income tax is due, multiply the amount on Line 2 by 2½% (.025). Enter this tax surcharge on Line 3.

In addition to the tax surcharge, Line 3 and the spaces below it are to be used for: (1) entering the amount of any unincorporated business tax due from Line 6 of Schedule U-C of attached Form IT-202 or Line 24, Part III of Form IT-212; (2) applying any 1972 estimated unincorporated business tax payments; (3) applying any tax paid on a tentative return of the estate or trust; (4) applying tax withheld on a decedent's wages which were received by the estate or trust (attach Wage and Tax Statement, Form IT-2102) or (5) adding the amount of minimum income tax due from Form IT-220. Show nature and amount of each item reported here. If additional space is needed add an explanatory statement. (IMPORTANT — Follow instructions for Form IT-212 if an investment credit under Section 701(d) is claimed against the unincorporated business tax payable by the fiduciary.)

A balance of tax due of more than $1.00 must be paid in full with the return. It is not necessary to pay a balance due of $1.00 or less.

Make remittance payable to "NY State Income Tax Bureau."

An overpayment of more than $1.00 will be refunded automatically. An overpayment of $1.00 or less will be refunded only if requested in a separate signed statement attached to the return.



## Schedule 4
## Shares of N. Y. Fiduciary Adjustment

The purpose of this schedule is to show the distribution of the New York Fiduciary Adjustment among the beneficiaries and the fiduciary of the estate or trust. The shares of the beneficaries and of the fiduciary in the New York Fiduciary Adjustment (Line 8 of Schedule 7) are in proportion to their respective shares of Federal distributable net income of the estate or trust.

**Column 1** — Enter the respective shares of Federal distributable net income of each beneficiary and of the fiduciary on the appropriate lines of Column 1. Note that for purposes of allocating the Fiduciary Adjustment among the resident taxpayers, entries must be made in Columns 1 and 2 of Schedule 4 for all beneficiaries, both resident and nonresident, even though a nonresident beneficiary's share of modifications is determined in Schedule 9 of Form IT-205-A.

**Column 2** — Determine the percentage interest of each beneficiary and of the fiduciary in Federal distributable net income of the estate or trust, based upon amounts in Column 1, and enter such percentage on the appropriate line of Column 2.

**Column 3** — Enter the amount of the New York Fiduciary Adjustment (from Line 8 of Schedule 7) on the Total line of Column 3. The share of each beneficiary and of the fiduciary in such total amount is determined by multiplying the total Fiduciary Adjustment by the Column 2 percentage.

If the estate or trust has no Federal distributable net income, the share of each beneficiary in the Fiduciary Adjustment shall be in proportion to his share of the estate or trust income for the taxable year, under local law or the governing instrument, which is required to be distributed currently and any other amounts of such income distributed in such year. Any balance of the Fiduciary Adjustment not allocable to beneficiaries shall be allocated to the estate or trust. If the shares in the New York Fiduciary Adjustment are apportioned in accordance with this paragraph, do not complete Schedule 4. Instead, show the apportionment in a schedule annexed to the return.

Where an item of income, gain, loss or deduction is attributable to corpus or principal or the beneficiaries do not share pro rata and the applicable method set out above for apportioning the Fiduciary Adjustment results in an inequity, as defined in Sections 120.27 and 135.28 of the Personal Income Tax Regulations regarding alternate methods of attributing modifications, a fiduciary may, in his discretion, use the applicable method set forth in such regulations. If an alternate method is used, the fiduciary, in lieu of completing Schedule 4, should annex to the return a schedule containing the information required under the applicable regulation.



## Schedule 5
## Details of Federal taxable income of fiduciary

Lines 1-23 of Schedule 5 correspond to similarly numbered lines of the schedule on Page 1 of Federal Form 1041. Enter on each applicable line of Schedule 5 the amount reported on the corresponding line of the Federal schedule. **If a capital gain or loss is reported on Line 6, attach a copy of Federal Schedule D and any related schedules.** In lieu of completing Schedule 5, a copy of Federal Form 1041 may be attached to Form IT-205.

## Schedule 6
## Resident beneficiary's share of income, deduction and tax preference items from Federal Schedule E

Complete Schedule 6 for resident beneficiaries only. Entries are to be made for each resident beneficiary on the line which identifies him

by the letter (a, b, c or d) used in Schedule 1. Enter the same amounts in the various columns of Schedule 6 as are reportable for each resident beneficiary on the corresponding lines of Federal Schedule E. In lieu of completing Schedule 6, a copy of Federal Schedule E (Form 1041) or any authorized substitute may be attached to Form IT-205. However, Column 11 of Schedule 6 must be completed if the total Federal amount of tax preference items are subject to modification under Section 622(b) of the Tax Law.

**Column 11** — Enter in this column the total modified Federal amount of Tax Preference items and submit details of the modifications made in an attached statement. See Form IT-220-I for an explanation of the required modifications.

## Schedule 7

## New York Fiduciary Adjustment

This schedule is used for computing the New York Fiduciary Adjustment, which is then allocated among the estate or trust and its beneficiaries in Schedule 4. The additions and subtractions enumerated in Schedule 7 of Form IT-205 and in the instructions for Lines 2, 3 and 6 below, which relate to items of income,



gain, loss or deduction of the estate or trust, constitute the Fiduciary Adjustment under Section 619 of the Tax Law. However, the additions and subtractions for Lines 1 and 5 of Schedule 7 and those described below for Line 3, item a and for Line 6, items a, c, d, j and k need not be made with respect to any amount paid or set aside for charitable purposes. (See Payments for Charitable Purposes, page 2.)

**Line 2 / Income taxes deducted on Federal Fiduciary Return:** All income taxes deducted on the Federal fiduciary return are to be added back on Line 2 with the exception of the New York City Earnings Tax imposed on New York City nonresident taxpayers to the extent that such tax exceeds the tax computed as if the rates were ¼% of wages subject to tax and ⅜% of net earnings from self-employment subject to tax.

**Line 3 / Other additions:** Describe on the lines provided the nature and amount of any of the following items:

a) 20% of the long-term capital gain deduction to the extent such amount relates to capital gains included in Federal distributable net income.

b) Interest or dividend income on bonds or securities of any United States authority, commission or instrumentality which U. S. laws exempt from Federal income tax but not from state income taxes.

c) Interest deducted on money borrowed and used to purchase or carry bonds or securities the income from which is exempt from NY State income tax.

d) Any amount deducted on the Federal Fiduciary return for expenses which relate to income which is exempt from New York State income tax or to property held for the production of such exempt income.

e) Any amount deducted on the Federal Fiduciary return for amortization of bond premium on any bond the interest from which is exempt from New York State income tax.

f) Amounts required under Sections 612(b)(7), 612(b)(8) and 612(b)(9) of the Tax Law in connection with certain employee benefits received by shareholders of a professional service corporation.

g) In the case of mines, oil and gas wells and other natural deposits, any deduction for percentage depletion to the extent such depletion relates to income included in Federal distributable net income.

h) Any amount required to be added to Federal income under the provisions of Section 612(h) of the Tax Law regarding the optional modification permitted with respect to expenditures for waste treatment facilities or air pollution control equipment, to the extent such amount relates to items included in Federal distributable net income of the estate or trust. (For instruction regarding subtraction to be made on Line 6 of Schedule 7 for such expenditures see item k of the following instruction for Line 6.)

Compute any addition required because of an election under Section 612(g) of the Tax Law on Form IT-211. See General Instructions.



**Line 6 / Other subtractions:** Describe on the lines provided the nature and amount of any of the following items:

a) Interest or dividend income on bonds or securities of any United States authority, commission or instrumentality included in Federal income but exempt from state income taxes under United States laws.

b) Pensions of retired officers or employees of New York State or its political subdivisions (towns, cities, etc.) to the extent included in Federal income or gain as well as pensions received as beneficiaries of deceased officers or employees of New York State or its political subdivisions.

c) Interest or dividend income on bonds or securities to the extent exempt from income tax under New York laws authorizing the issuance of such bonds or securities but included in Federal income.

d) Any refund or credit for overpayment of income tax of any kind to the extent included in Federal income.

e) Interest on money borrowed and used to purchase or carry bonds or securities the income from which is subject to the New York State income tax but exempt from Federal income tax to the extent such interest was not deducted on the Federal Fiduciary return.

f) Ordinary and necessary expenses paid or incurred during 1972 in connection with income, or property held for the production of income, which is subject to New York State income tax but exempt from Federal income tax, to the extent such expenses were not deducted on the Federal Fiduciary return.

**IT-205-I 1972**

g) Amortization of bond premium attributable to 1972 on any bond the interest from which is subject to New York State income tax but exempt from Federal income tax, to the extent such amortization was not deducted on the Federal Fiduciary return.

h) The amount of supplemental annuity received under the Railroad Retirement Act of 1937 to the extent included in total Federal income but exempt from state income taxes under United States laws.

i) The amount necessary to prevent taxation of amounts properly included in New York adjusted gross income in prior years (in accordance with Section 612(b)(7) of the Tax Law) by a shareholder of a professional service corporation.

**Note:** The following subtractions (j, k, l and m) may be made only to the extent that they relate to items included in Federal distributable net income of the estate or trust:

j) With respect to property for which percentage depletion was added at Line 3, cost depletion computed pursuant to I.R.C. Section 611.

k) Expenditures pursuant to an election under Section 612(h) of the Tax Law in connection with waste treatment facilities or air pollution control equipment, the construction, reconstruction, erection or



improvement of which was initiated (in the case of waste treatment facilities) on or after January 1, 1965 and (in the case of air pollution control equipment) on or after January 1, 1966. This subtraction applies only to depreciable, tangible business property located in New York State and certified under the provisions of the Public Health Law. This subtraction is not permitted when the election under Section 612(g) of the Tax Law has been exercised on such property. (Also see item h of the instructions for Line 3 above.)

l) The portion of any gain from the sale or other disposition of (a) property which had a higher basis for New York State income tax purposes than for Federal income tax purposes on December 31, 1959 (or on the last day of a fiscal year ending during 1960) and (b) property held in connection with mines, oil or gas wells and other natural deposits which has a higher adjusted basis for New York State income tax purposes than for Federal income tax purposes which does not exceed such difference in basis. However, if the gain is considered a long-term capital gain for Federal income tax purposes, the deduction is limited to 60% of such portion of the gain.

m) The amount of any income or gain which was properly included in income or gain reported on a prior New York State income tax return under Article 16 of the Tax Law by the estate or trust or by the decedent or by another estate or trust from which the taxpayer received such income or gain.

Compute any subtraction required because of an election under Section 612(g) of the Tax Law on Form IT-211. See General Instructions.

*Appendix F — Instructions for Form IT-205*
*New York State Fiduciary Return*

**Member of Partnership** — If the estate or trust has income as a member of a partnership, any of the additions or subtractions which apply to such income should be included in Schedule 7 of Form IT-205. The estate's or trust's share of such partnership items may be obtained from the New York partnership return on Form IT-204.

**Beneficiary of another Estate or Trust** — If the estate or trust is a beneficiary of another estate or trust, the share of the Fiduciary Adjustment of such other estate or trust to be included in Schedule 7 of Form IT-205 may generally be obtained from its fiduciary.

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**GIFT TAX** — The New York State Legislature enacted a Gift Tax Law effective the first quarter of 1972. You must file a Gift Tax Return if (1) the value of the gift exceeds $3,000 or (2) the total value of gifts you gave to any one donee during the calendar year exceeds $3,000. Any questions you have regarding this law may be directed to the nearest New York State District Tax Office.



## APPENDIX G — NEW YORK TAX STATUTES INVOLVED

Tax Law, §618 as amended by chapter 718 of the Laws of 1973 provides in pertinent part:

> "§ 618. New York taxable income of a resident estate or trust
>
> "The New York taxable income of a resident estate or trust means its federal taxable income as defined in the laws of the United States for the taxable year, with the following modifications:
>
> * * *
>
> "(4) There shall be added or subtracted (as the case may be) the modifications described in paragraphs (6), (10) and (11) of subsection (b) and in paragraphs (11) and (13) of subsection (c) of section six hundred twelve."

Tax Law, § 612 as amended by chapter 1 of the Laws of 1972 provides in pertinent part:

> "§ 612. New York adjusted gross income of a resident individual
>
> "(a) General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.
>
> "(b) Modifications increasing federal adjusted gross income. There shall be added to federal adjusted gross income:
>
> * * *
>
> "(11) In the case of a taxpayer who has deducted one-half of the amount by which net long-term capital gain exceeds net short-term capital loss for the taxable year, one-fifth of the amount so deducted."

## APPENDIX H — NEW YORK STATE CONSTITUTIONAL PROVISION INVOLVED

Article 1, § 6, provides in pertinent part:

> "No person shall be deprived of life, liberty or property without due process of law."

In The

# Supreme Court of the United States

October Term, 1977

No. 77-1742

THE STATE TAX COMMISSION, THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

*Petitioner,*

*v.*

HOLLY S. CLARENDON TRUST,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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THE STATE TAX COMMISSION, THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

*Petitioner,*

*v.*

HOLLY S. CLARENDON TRUST,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Respondent Holly S. Clarendon Trust prays that the State Tax Commission's Petition for Writ of Certiorari in the above captioned matter be denied.

### Jurisdiction

The Respondent maintains that the Court does not have jurisdiction for the reasons stated in Point I of the Argument.

## Questions Presented

1. Does the June 11, 1973 amendment to Section 618 (4) of the New York Tax Law which retroactively taxed the Respondent's voluntary sales of stock in February and March, 1972, violate federal due process guarantees?

2. Does the June 11, 1973 amendment to Section 618 (4) of the New York Tax Law which retroactively taxed the Respondent's voluntary sales of stock in February and March, 1972, violate due process guarantees of Article I, Section 6 of the New York Constitution?

## Constitutional Provisions and New York Statutes Involved

The Petitioner's otherwise correct recitation of Constitutional provisions and statutes involved should include Article I, Section 6 of the New York Constitution, which provides in pertinent part that:

> "No person shall be deprived of life, liberty, or property without due process of law."

## Counter Statement of Facts

The Respondent Holly Clarendon Trust was established in 1949 as a simple, inter vivos New York trust. It is a calendar year taxpayer. In February and March 1972 the Trust sold a substantial amount of its common stock and realized a net long term capital gain of $1,335,206.

The Trust was under no obligation to sell the stock. Contrary to the Petitioner's incorrect statement (Petition, p. 7), the decisions on the sale of stock were made only after the tax costs were considered (See Affidavit of John S. Gilman, Trustee, Appendix A).

The Trust filed a timely 1972 New York State income tax return in March, 1973, reporting a taxable income of $667,003.



The Trust's taxable income was determined in accordance with Tax Law §618, "New York Taxable Income of a Resident Estate or Trust", as it then existed. As provided in that section, the Trust took a $667,603 long-term capital gain deduction. This was 50% of the Trust's $1,335,206 net long-term capital gain. In the Petitioner's instruction booklet for 1972 fiduciary income tax returns (Petition, Appendix F), resident trusts and estates were advised to add back into taxable income 20% of the net long-term capital gain deduction (Petition, p. A-32). This provision conflicted with Tax Law §618, which provided for no such increment in taxable income. This booklet was published in September 1972, nine months before Section 618 was amended and six months after the sale of the stock. The Respondent filed the return in accordance with Section 618 and did not make the adjustment described in the booklet.

On June 11, 1973, three months after the return was filed and almost one and a half years after the stock was sold, Tax Law §618 (4) was amended to provide that 20% of a trust's net long-term capital gain deduction be added back into its taxable income. This amendment was made retroactive to January 1, 1972. On September 19, 1973, the Petitioner sent the Respondent a "Statement of Audit Changes" by which it proposed to increase the Respondent's taxable income by $133,520.60, which was 20% of its $667,603 net long-term capital gain deduction. This adjustment would have resulted in additional tax of $19,359.40, plus interest. The Respondent refused to pay this amount and began proceedings resisting its assessment. The New York courts held that the retroactive application of the statute violated the New York Constitution's and the U.S. Constitution's due process guarantees.

## ARGUMENT

### Reasons for Denying the Writ

### POINT I

**The Court has no jurisdiction since the decision of the N.Y. Court of Appeals is based on adequate and independent state grounds.**

The Court will not review a state court decision if it is based on an adequate and independent state ground. *Murdock v. City of Memphis*, 20 Wall. 590 (1875); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Lynch v. New York*, 293 U.S. 52 (1934). Since the judgment of the New York Supreme Court, as affirmed by the New York Court of Appeals, is based equally on the New York Constitution and the United States Constitution, this Court should not grant the writ. This Court stated in *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935):

> . . . where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment. (296 U.S. 207, at 210).

Granting the writ would lead only to an advisory opinion on the merits. Even if this Court reverses the decision below and holds that the questioned statute does not violate the federal due process clause, the statute would nonetheless violate the New York due process clause. This Court warned against such advisory opinions in *Herb v. Pitcairn, supra*, at 125-126.

This case is indistinguishable from *City of New York v. Central Savings Bank*, 280 N.Y. 9, *cert. den.* 306 U.S. 661 (1939). In that case, as here, the New York Court of Appeals held that a state statute violated both federal and New York due process guarantees. The Petitioner cites *only* the Court of Appeals' decision (Petition, p. 13) and conveniently omits the citation of



this Court's subsequent decision denying the writ. That decision is as follows:

> Denied for the reason that the judgment sought to be reviewed rests on a non-Federal ground adequate to support it. (306 U.S. at 661).

The Petitioner relies on the New York Court of Appeals' decision in *Central Savings Bank*, but this Court's subsequent disposition of that case, which the Petitioner overlooks, is conclusive authority for denying the writ.

### POINT II

**The issue presented lacks national importance and is too narrow to warrant review.**

This case does not present the "special and important" elements required by Rule 19. It arose from unusual circumstances which are unlikely to recur.

### POINT III

**A full hearing by this court would not result in a reversal.**

Every New York judge who ruled on this case found the retroactive statute unconstitutional. The New York Court of Appeals disposed of the matter with a terse memorandum decision. All arguments in the Petition have been unanimously rejected below.

## POINT IV

**The Petitioner's authorities are distinguishable.**

The Petitioner emphasizes unrelated sections of the Tax Law to justify the retroactive amendment of Section 618 (4). These are Section 611, "New York Taxable Income of a Resident Individual", and Section 612, "New York Adjusted Gross Income of a Resident Individual". The legislative history of these sections is noteworthy.

In the 194th Session of the New York Legislature, Section 612 of the Tax Law, which relates to the income taxation of *individuals*, was amended to provide for the addition to adjusted gross income of 20% of the net long-term capital gain deduction. (L. 1972, c.1 §9).

In the 195th Session, no action was taken on the sections of the Tax Law pertinent here.

In the 196th Session, the retroactive amendment to Section 618 (4) at issue was made (L. 1973, c.718, §2). The Tax Section of the New York State Bar Association recommended that this amendment be disapproved because of its retroactive application (Letter of Commissioner Gallman, Petitioner Appendix E).

The Petitioner argues that the retroactive amendment to Section 618 merely corrected a technical error in draftsmanship arising when Section 612 was amended. Assuming that an error was made, it does not follow that the "curative" amendment to Section 618 can overreach constitutional limitations. The Petitioner cites no case in which this Court upheld a tax statute made retroactive beyond the preceding legislative session. The Petitioner relies heavily on *Welch v. Henry*, 305 U.S. 134 (1938). That case is distinguishable not only because it dealt with retroactive taxes on dividends, as opposed to voluntary sales, but also because it establishes that retroactive taxes cannot extend beyond the time of the immediately preceding legislative session.



The Petitioner improperly relies on the dissent in *Untemyer v. Anderson*, 276 U.S. 440 (1928), (Petition, p. 10) to justify the retroactive amendment to Section 618. However, almost every case cited in that quote involved taxes made retroactive only to the beginning of the year of enactment. Two statutes cited in the passage were made retroactive to a prior year. These were the Joint Resolution of July 4, 1864 and the Act of February 24, 1919. However, an examination of the legislative history of those two statutes reveals that, unlike the statute in question here, neither was made retroactive beyond the preceding legislative session.

The Petitioner relies on *Shapiro v. City of New York*, 32 N.Y. 2d 96 *rehearing den* 414 U.S. 1087 (1973) (Petition, p. 8). The issue in *Shapiro* was whether the New York City unincorporated business tax could be imposed on professionals. Retroactivity was not an issue, nor was capital gains taxation. Petitioner's quote from *Shaprio* is out of context and misleading in two respects. That quote is as follows:

> If such changes are forbidden in the name of equal protection legislatures in laying new taxes would be left powerless to rectify to any extent a previous distribution of tax burdens which experience has shown to be inequitable, even though constitutional.
> (*Shapiro*, 32 N.Y. 2d 96, at 105, Petition p. 8).

First, the "changes" referred to in the quote were not *retroactive* changes. Second, the quote, which is an excerpt from *Welch v. Henry, supra*, deals with the 14th Amendment's equal protection clause. The Respondent has never claimed a violation of equal protection rights.

The Petitioner's reliance on *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931), is misplaced (Petition, p. 9). That case upheld the extension of the statute of limitations to permit the collection of taxes which, under a previous decision of this Court, had been time-barred. This Court emphasized that the curative statute

was constitutionally permissible in that instance because it did not retroactively create or increase a liability.

The Petitioner suggests that *Milliken v. United States*, 283 U.S. 15 (1931) permits retroactive gift taxes on previously untaxed property transfers (Petition, p. 12). That is incorrect. *Milliken* dealt with the issue of *estate* tax rates applied to gifts made in contemplation of death. Taxation of previous transfers was not an issue because, for estate tax purposes, gifts in contemplation of death are deemed to occur at death. The Petitioner's quotation from *Milliken* is out of context and misleading.

> The present gift was subject to the excise when made, and for reasons already indicated, we think a mere increase in the tax, pursuant to a policy of which the donor was forewarned at the time he elected to exercise the privilege, did not change its character. (*Milliken, supra*, at 24, from the Petition, p. 12).

The "excise" referred to was not a gift tax on the prior transfer. The "excise" was the *estate* tax on the transfer which was deemed to have been made at death. In this regard, retroactive taxation was not an issue.

*Phillips v. Dime Trust & S.D. Co.*, 284 U.S. 160 (1931) has no bearing on this case (Petition, p. 12). *Phillips* dealt with the estate tax on tenancies by the entirety. Retroactive taxation was not even considered in that case.



## CONCLUSION

For the reasons stated, the Writ for Certiorari should be denied.

DATED: June 16, 1978

Respectfully submitted,

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# APPENDIX



## AFFIDAVIT OF JOHN S. GILMAN, TRUSTEE

STATE OF NEW YORK – SUPREME COURT
COUNTY OF MONROE

HOLLY S. CLARENDON TRUST,

*Plaintiff,*

*against*

THE STATE TAX COMMISSION, THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

*Defendant.*

Index No. 11100/76

JOHN S. GILMAN, being duly sworn, deposes and says:

1. That I am an attorney admitted to practice in the State of New York and am a partner in the firm of Woods, Oviatt, Gilman, Sturman & Clarke.

2. That I am a trustee of the Holly S. Clarendon Trust, a resident New York trust and plaintiff in the within action.

3. That the trust is a calendar year taxpayer, and that in 1972 it realized net long-term capital gains of $1,335,206 from the sale of stocks in February and March 1972. (Exhibit A)

4. That the taxable income of resident *trusts and estates* is defined by Section 618 of the New York Tax Law. In contrast the taxable income of resident *individuals* is defined by Section 611 and 612 of the Tax Law.

5. That the trust's 1972 taxable income was computed in accordance with Section 618 of the New York Tax Law, entitled "New York Taxable Income of a Resident Estate or Trust." Pursuant to that section as it then existed, the trust took a

deduction of $667,603, which was 50% of its 1972 net long-term capital gains. This was the amount required to be deducted when the long term capital gains were realized and when the return was filed on March 20, 1973.

6. That on July 29, 1974 the State Tax Commission issued a notice of deficiency and statment of audit changes which attempted to assess an additional tax of $19,359.40 against the trust. This amount was computed by adding 20% of the trust's aforesaid long-term capital gains deduction back into its taxable income. *(Exhibit B)*

7. That the Tax Commission based its proposed deficiency on two grounds. First, it claimed that a 1972 amendment to Section 612 of the Tax Law, which added back into a resident *individual's* taxable income 20% of the long-term capital gains deduction, also applied by inference to Section 618 of the Tax Law. However, in 1972, Section 618 of the Tax Law, the only statutory definition of a resident trust's taxable income, made no reference whatsoever to the portions of Section 612 dealing with the capital gains deduction. Thus, the Tax Commission wholly disregarded the clear language of Section 618 as it existed in 1972. There is absolutely no authority for computing a trust's taxable income other than in accordance with Section 618.

8. That the Tax Commission's second argument for assessing the proposed deficiency is based on an amendment to Section 618 passed on June 11, 1973. That amendment incorporates by reference the language of Section 612 which adds back to taxable income 20% of the long-term capital gains deduction. This amendment was made applicable to all tax years of trusts and estates beginning on or after January 1, 1972. The retroactive application of this amendment is repugnant to the due process guarantees of Article I Section 6 of the New York Constitution and the 5th and 14th Amendments to the United States Constitution. See Point III of plaintiff's Memorandum of Law.



9. That as trustee of the Holly Clarendon Trust, I was under no obligation to sell the stocks giving rise to the long term capital gains in question. I could have sold less stock, different stock, or no stock at all. In reaching the decision to sell those shares, one of the factors I considered was the tax cost.

10. That the Trust followed administrative channels in seeking a correction of this proposed deficiency. In the two years following the issuance of the notice of deficiency, telephone conferences were made, a petition was filed, and an administrative hearing was held, but no decision was reached by the Tax Commission. Finally, four days after this suit was filed and almost ten months after the administrative hearing, the Tax Commission ruled that it had no jurisdiction to find a statute unconstitutional. *(Exhibit C)*. It is very clear that administrative relief is illusory in this case. New York courts permit suits for declaratory judgment without resorting to administrative remedies where the constitutionability of a tax statute is in issue. (See Part I of plaintiff's Memorandum of Law). Furthermore, the defendant's dilatory practices in reviewing this matter caused the trust to incur needless and extraordinary expenses.

/s/ JOHN S. GILMAN
John S. Gilman *Trustee*

Sworn to before me
this 23rd day of
September, 1976

/s/ EUGENE PARRS
*Notary Public*

EUGENE PARRS
Notary Public in the State of New York
MONROE COUNTY, N.Y.
Commission Expires March 30, 1978